

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
BRIEF**

77-1420

To be argued by
JO ANN HARRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1420

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS RIZZI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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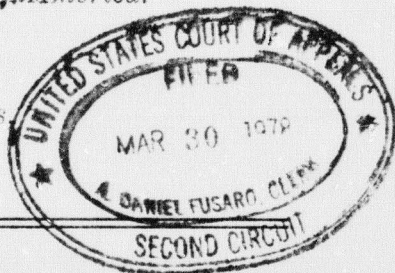


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**SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF
AMERICA**

Preliminary Statement

This supplemental brief for the United States is submitted pursuant to this Court's orders, dated February 1, 1978, and February 21, 1978 which granted Nicholas Rizzi's motion to relieve his court-appointed counsel,* appointed new counsel, and provided for the filing of supplemental briefs.

We respectfully refer the Court to the Government's main brief on this appeal for the complete statement of facts and procedural history of this case.

* Rizzi's *ex parte, pro se* motion was decided after both sides had filed full briefs on this appeal. The basis for the motion was not related to the merits of the case, the quality of counsel, or to the competence of appellant's original brief, but rested on a claimed personal dispute between Rizzi and his original counsel.

ARGUMENT

POINT I

The Evidence Was More Than Sufficient To Establish Rizzi's Guilty Knowledge.

In the Government's main brief on this appeal, we reviewed at length the evidence which clearly showed that Rizzi was a knowing, active and interested participant in the Medicaid fraud charged in the indictment. In his supplemental brief, Rizzi responds to the strong proof against him by charging, without support, that the Government manipulated its review of the evidence against him in our brief, and he attempts again to convince this Court that Rizzi merely was an innocent and disinterested bystander—"a former junkie"—who was duped by Sacolick. As we demonstrated in our principal brief (at 17-26), nothing could be further from the picture that emerged from the totality of the evidence adduced at Rizzi's trial. In view of the unfounded charge made in Rizzi's new brief—itself replete with baseless assertions of fact—we respond briefly to his mistaken arguments.

Rizzi continues to paint himself, without the faintest basis in the record, as a minion with no responsibilities in connection with the Second Avenue Methadone Maintenance Program. This remarkable assertion simply is dispelled by Rizzi's receipt of \$116,098 in fees from Sacolick during 1973 and 1974 for Rizzi's management of the Second Avenue Program.* The jury

* There is no support whatsoever in the record for the bald assertion in Rizzi's brief (at 15), that Rizzi received a percentage only of the legitimate \$4 billing. Furthermore, even if Rizzi had not received one dime of the illicit Medicaid payments

[Footnote continued on following page]

plainly was entitled to reject as absurd Rizzi's argument that a person averaging \$58,000 a year in management fees was performing ministerial tasks.* In addition, a virtual parade of witnesses and exhibits attested that Rizzi, in fact, was, and repeatedly said he was, in charge of the Second Avenue Program.** Gov. Brief at 7-8, 15-16.

Although it is not clearly articulated in his supplemental brief, Rizzi appears to be attacking the sufficiency of the Government's evidence of his guilty knowledge on two separate grounds. He seems to argue that there was no evidence to show that he knew of the *existence* of the regulation requiring care within the competence of a general practitioner to be provided for the \$4 daily Medicaid rate. He appears to argue further that even if he did know of the regulation, there was no way that he, a mere layman, could have known which care was within the competence of a general practitioner. He is wrong on both counts.

directly, there would have remained the irrefutable fact of Rizzi's substantial interest in the overall financial success of the Second Avenue Program. His knowing participation in the scheme, as demonstrated by all of the evidence, was more than enough to support his conviction for aiding and abetting, without any evidence of his direct cut of the kick-back proceeds. See Gov. Brief at 20.

* It is comic distortion to compare Rizzi, as Rizzi seeks to do in his supplemental brief, with Richard Yurasits who was never free of methadone maintenance. Yurasits started as a helper whose dollar an hour was applied as credit toward his methadone, and he never made more than \$250 a week. (Tr. 538-39).

** Rizzi's Supplemental Brief (at 6, 9) makes the wholly mystifying claim that Sacolick was in charge on a day to day basis, thoroughly immersed in the operation of the Second Avenue Program. That assertion is not supported by the record and, in fact, is roundly contradicted. See Gov. Brief at 15. Even in the first year of operation Sacolick was on the premises but a couple of times a week, and then only for an hour, hardly a total immersion as now claimed by Rizzi. (Tr. 590-91).

First, the jury clearly was entitled to infer from the scope of his responsibilities in the Second Avenue Program—a Program entirely funded by public monies—and his enormous stake in its financial success, that Rizzi well knew the government regulations which controlled its billing. There was, in fact, evidence that the very regulation in question was seen on Rizzi's desk. (Gov. Brief at 7, 21). Further since Rizzi had been a private patient on the Program, there can be no doubt that he knew that routine medical care was included in the then \$20-a-week fee. It is perfectly logical to conclude that he knew the \$24-a-week Medicaid fee included the same services. Indeed, evidence of the Schwartz Seminars, after which Rizzi continued his fraudulent actions, demonstrated conclusively that he knew what was required by the Medicaid authorities.*

Second, on the question of guilty knowledge, Rizzi attempts to make a medical mystery out of the definition of the phrase "within the competence of a general practitioner." His struggle to do so fails miserably in the face of the dandruff, constipation, sweating, pimples sleeplessness and common colds which formed the bulk of the staff doctors' business. Regardless of the expertise necessary to judge what a general practitioner could handle in a close case, the situation at this Program was so gross as to be apparent to the simplest-minded layman. (Tr. 685; 709). In an effort to refute this reality Rizzi reels off an imposing list of medical diagnostic terms which appeared on some of the Medicaid invoices generated by the attending physicians at the Second Avenue Program. He conveniently overlooks the majority of invoice diagnoses, which were in plain English and claimed fees for the treatment of such exotic problems as "insom-

* Rizzi's handling of the Schwartz Seminar evidence is discussed in more detail at pp. 6-7, *supra*.

nia," "common cold," "ingrown toenail," "constipation," "acne," and "hemorrhoids." (GX 7, 7A-7G; GX 8, 8A-8H; GX 9, 9A-9G; GX 10, 10A-10H). In any event, the Government never suggested that the only evidence of Rizzi's guilty knowledge of the fraud was his opportunity to see the invoice diagnoses. Rizzi, as an ex-user of methadone, well knew the complaints caused by the regular ingestion of methadone—chiefly, constipation, dry skin, sweating, sleeplessness. From this personal experience plus his daily contact with patients*—a fact which he touts here—the jury properly could infer that he obviously understood that this patient population was producing minor and non-existent complaints, regardless of what the doctors chose to call them for purposes of enhancing the professional appearance of the Medicaid invoice.** Indeed, every doctor who testified confirmed that minor complaints were what he expected to see and in fact, did treat. (See, e.g., Tr. 212-13).***

* Rizzi's office was next door to the doctor's office. There, on a daily basis, he could not have ignored the queue of patients waiting to see the doctor for their assorted minor complaints.

Also, contrary to his present assertion (Br. at 16), Rizzi, as director of the Program, *was* responsible for sending patients to Park Avenue each week for *no* ailment at all. (Tr. 515-16; 572-76). It must be noted in this context that the Government never contended Rizzi concocted any part of this scheme on his own. In fact, as we stated repeatedly to the jury at trial and in our principal brief, it is clear that Sacolick masterminded the scheme. Rizzi was charged with aiding and abetting; in this instance, with knowingly assisting in Park Avenue scam.

** Contrary to the assertion in Rizzi's Supplemental Brief at 14, Dr. Newman specifically testified that methadone patients in general have no complaints related to the liver. (Tr. 165). In fact, he testified that methadone maintenance patients are "remarkably healthy individuals." (Tr. 116).

*** This was also confirmed by the records of the four patients which were selected as a basis for the indictment charges. (GX 7-10). The Government, of course, selected but four patients because the case otherwise would have been unmanageable. These particular patients were carefully chosen as *typical* of all patients. (Tr. 707; 715; 719).

Finally, Rizzi's presentation and discussion of the Seminar evidence is absolutely wrong.* Rizzi claims that there was no evidence of the subject matter of the Seminars he attended, and that in any event the complaints expressed there were only as to the reimbursement rate which would not have enlightened him. The record clearly is to the contrary. Both Al Schwartz and Kenneth Bitz testified that the subject of the inability of the Methadone Programs to provide the *required routine medical care at the \$4 rate* was debated throughout these Seminars. Schwartz said that the subject came up at *every* meeting and was, in fact, the not-so-hidden agenda of the Programs owners and operators when they agreed to attend the Seminars. (Tr. 661-62; 672-75). Rizzi sat in the Seminars with full knowledge that his program was not providing routine medical care within the \$4 rate. He knew that, instead, Medicaid was being billed additionally every time a patient saw a doctor. He knew that up to 50% of each doctor's billing was being kicked-back as pure gravy to the Second Avenue Program, and he knew the Program was profiting mightily from it.** Evidence with respect to these Seminars was

* We need not address at length Rizzi's selective and feeble attempt to explain any of his actions with Kamen. It is sufficient to note that the jury obviously could conclude that Rizzi's manner of dealing with Kamen—presenting the checks face down and instructing him not to look—proved his knowledge and personal stake in the fraud. Moreover, Rizzi does not even attempt to come to grips with the piles of blank invoices he supplied to Kamen with directions to endorse, or with his direction to Yurasits to sign Kamen's signature on the back of Kamen's checks. And he conveniently overlooks the fact that Rizzi not only presented Kamen's checks to Kamen for endorsement, but *carried them away* to give to Sacolick for deposit in Sacolick's bank account. Similarly he doesn't touch upon Rizzi's efforts to collect the kick-backs from the other doctors.

** After the Seminars, the Government's proof showed Rizzi continued to collect the fraudulent kick-backs from Dr. Zane, the remaining doctor at the Program.

not only enlightening, with all of the other evidence in the case it pointed unerringly to Rizzi's guilty knowledge.

POINT II

The Sacolick P.C. Checks Were Properly Admitted Into Evidence.

Rizzi contends for the first time on appeal, that two Sacolick checks payable to Enar improperly were received in evidence for lack of a sufficient foundation to show them as business records.* The two checks in question were entirely handwritten and each bears on its face, in the same handwriting, notations which indicate that the two checks were related to each other, and to Dr. Kamen's Medicaid payments. (GX 43o; GX 43p)** The Govern-

* They are only two of scores of unchallenged checks admitted at the same time, each of them representing monthly disbursements from Sylvan L. Sacolick, M.D., P.C. ("Sacolick P.C.") (the corporation through which Dr. Sylvan L. Sacolick owned the Second Avenue Program) to Enar Management Services, Inc. ("Enar") (the corporation through which appellant Rizzi operated the same program). (GX 42A-42D; 43A-43Y; 44A-44N). The series of checks cover a period of about two years from the late fall of 1972 through the end of 1974. Like the two checks in question, many of them were handwritten.

**GX 43o is a Sacolick P.C. check, dated April 12, 1974, in the amount of \$1920.40, and contains the following notation:

"thru 2/28/74 less 1057.50 reserve re Kamen pending."

GX 43p is a check dated May 10, 1974, in the amount of \$1057.50, and contains the notation:

"Balance on account through 2/28/74"

Inasmuch as \$1057.50 was precisely 30% of a Medicaid check in the amount of \$3,525.00 payable to Dr. Kamen which was deposited in the Sacolick P.C. Manufacturers Hanover Trust Co. account on or about May 7, 1974, the Government suggested, in the first instance, that the jury could infer the arrangement between Sacolick and Rizzi at the time was that Rizzi was to get 30% of Dr. Kamen's Medicaid checks, and could further infer that there may well have been a percentage arrangement between Sacolick and Rizzi with respect to Medicaid billings in the other doctors' names also.

ment referred to these checks, as well as to much other evidence, to show the financial arrangement between Sacolick and Rizzi. Although no objection of any kind was made in the District Court with respect to these checks, even though Rizzi and his attorney were given ample opportunity to examine them pretrial, defendant now claims that the Government did not satisfy the business records requirement for admission of this evidence.

Rizzi's failure at trial to object to admission of the two checks on any grounds, let alone the business record foundation objection now pressed, precludes assertion of the present claim on appeal.* *United States v. Fuentes*, 563 F.2d 527, 531 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 97 S. Ct. 2686 (1977). Application of the waiver doctrine particularly is appropriate to the case at bar since it is clear that the type of technical objections Rizzi now asserts were matters which readily could have been amplified further by the Government at trial if any objection had been voiced. Indeed, as this Court observed in *Fuentes*:

* A week and a half after admission of these checks and after the Government had rested its case, counsel for Rizzi raised a question with respect to them. At that time he said he viewed the notations on the checks as admissions of a co-conspirator, and asserted that the trial judge, therefore, should give some limiting instruction to the jury respecting their use. (Tr. 787). The judge properly declined to do so. See, e.g., *United States v. Projansky*, 465 F.2d 123, 137 n.26 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). Although counsel never challenged the *admissibility* of the checks under any theory, the judge then stated that in his view they had been admitted as business records. Counsel did not take exception to the court's statement, and there the matter rested until this second appellate brief on behalf of Rizzi.

"This failure to make timely objection when any inadequacy might have been rectified by the prosecution or resolved by the trial Judge's ruling precludes raising the claim at this time." 563 F.2d at 531.

In any event, even if this Court reaches the merits of Rizzi's contention, the record makes clear that all requirements of Fed. R. of Evid. 803(b)(6) were satisfied and that the trial judge properly could have overruled any objection to these checks had one been timely made. *Cf. Ulm v. Moore-McCormack Lines, Inc.*, 117 F.2d 222, 224 (2d Cir. 1941).

Muriel Kaplan, the witness who first identified the checks (Tr. 195-98), was the custodian of the records,* and also the bookkeeper assigned to Sacolick's accounts throughout the relevant period of time. She was familiar with Sacolick's handwriting, with the checks themselves and was responsible for reconciling Sacolick's bank statements and checks at the end of each month. (Tr. 186-87, 192). Thus, Kaplan clearly was a qualified witness under the Rule through whom the documents could be offered. Moreover, there was no doubt that Sacolick himself wrote the checks and the notations upon them,**

* The checks, along with all of Sacolick P.C.'s records were obtained by subpoena *duces tecum* addressed to Sacolick's accountant, for whom Kaplan worked. (Tr. 907).

** While Kaplan did not pause in her testimony to identify Sacolick's handwriting on these specific checks, GX 43o and GX 43p, she did identify his unique handwriting on others. (Tr. 195). In addition, Rizzi had stipulated that several other specimens of handwriting in evidence were Sacolick's. (Tr. 560-63; GX 39A, GX 39B). A comparison of these known samples with the checks in question established without doubt that Sacolick wrote the challenged checks, and had this been an issue at the time, the jury would have been permitted to so find. *United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174,

[Footnote continued on following page]

and it was crystal clear that the checks were drawn by Sacolick and kept by Kaplan in the course of regularly conducted business activity. This latter proposition was supported by a volume of uncontested evidence at trial which demonstrated that Rizzi, through Enar, received management fees from Sacolick, through Sacolick P.C. It was further supported by the fact that the Sacolick P.C. checks to Enar were drawn on a regular, periodic basis. Finally, any possible doubt as to the admissibility of these checks was removed by the testimony of Rizzi's accountant, Richard Kemna. Through Kemna the receipts and disbursements ledgers of Enar for the fiscal years 1973 and 1974 were admitted into evidence, without objection. (GX 41B; GX 41C). Kemna testified that each and every disbursement check from Sacolick's P.C. which Kaplan earlier had identified—including the two checks in question—constituted management fees to Enar and were duly entered in Enar's receipts ledger. (Tr. 203). Entries in the receipts book for April 1974 (GX 41B), and for May 1974 (GX 41C) confirmed that the two checks in question were received by Enar and were payments from Sacolick.* In sum, the dates on the face of each check in Sacolick's hand, the bank stamp date of deposit on the back of each check, the date of the entry Enar's books, and the similarity between the substance

193 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *Cf. Brandon v. Collins*, 267 F.2d 731, 733 (2d Cir. 1959).

Thus, the checks were sufficiently tied to Sacolick. See, e.g., *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). In fact, in his new brief at 15 appellant concedes that Sacolick wrote the notations.

* The following entries appear in the Rizzi's ledgers and correspond respectively to GX 43o and GX 43p:

<i>"Description</i>	<i>Dep Date</i>	<i>Deposits</i>
Sacolick MD (PC)	4/15	1,920.40
Part Payment—Jan, Feb, '74		
Sacolick MD (PC)	5/13	1,057.50"
Balance of Feb. payment		

of the notation on each Sacolick check and its matching entry in Enar's receipts books, proved conclusively that the checks were made in the regular course of business.* Rizzi's claim that admission of these checks amounted to error, let alone his remarkable suggestion of plain error,** therefore must be rejected by this Court.

POINT III

The District Court Did Not Commit Error In Connection With Dr. Zane's Testimony.

As his final point, Rizzi complains of a short colloquy between the witness, Dr. Zane, and the district judge about whether or not pap smears and gonorrhea tests could be analyzed by licensed laboratories as well as by pathologists. At trial, Dr. Zane responded that such was true (Tr. 318-19), but went on to note that he felt such laboratories were required to be supervised by pathologists. The judge commented that Dr. Zane was correct under current law but that he had learned, in another

*It is also clear that the notations on both checks alternatively were admissible as statements of co-conspirator Sacolick in furtherance of the conspiracy charged. *United States v. Rosenstein*, 474 F.2d 705, 710-11 (2d Cir. 1973).

** Contrary to Rizzi's argument, the two checks here did not comprise a substantial part of the Government's case, but amounted merely to one piece of evidence among many which demonstrated Rizzi's great financial interest and knowing involvement in the scheme. Indeed, the argument which the prosecutor made from the Sacolick P.C. checks—that they demonstrated Rizzi was getting 30% of the Medicaid checks in Kamen's name—did not rest entirely on Sacolick's notations on the checks. The fact was that Rizzi received a management fee in the amount of \$1,057.50 which was precisely 30% of Kamen's Medicaid check in the amount of \$3,525.00 for the same period of time. The chance of those odd figures occurring accidentally are astronomical. Thus, even without the notations regarding "Kamen pending" on the Sacolick check, the same argument could have been made to the jury.

case over which he had presided, that some laboratory facilities were permitted to operate under prior law without the supervision of a doctor. Rizzi's present suggestion that this brief and innocuous comment was plain error, is wholly frivolous.

The record makes abundantly clear that whether or not these tests could be performed by laboratory technicians without a doctor's supervision was entirely immaterial to the case. During the fall of 1973, Dr. Zane was called in by Sacolick to examine the female patients at the Second Avenue Program. Zane was instructed to do three things: a vaginal examination, a gonorrhea test and a pap smear test. Zane's fee for the actual examination of the patient was billed to Medicaid *separately* from the two tests. (Tr. 294). It was uncontested at trial that the actual examination of each patient was within the competence of a general practitioner. (Tr. 293). Thus, it was the fraudulent billing for the examinations, alone, which formed the basis for the charges in the indictment against Rizzi as they related to Zane in the fall of 1973 (Tr. 731). The Government never contended in any way that the separate billings for the pap smear and gonorrhea tests were fraudulent. Accordingly, the exchange between the trial judge and Dr. Zane on this point was totally immaterial to the issues at trial.

Finally, Judge Goettel's inquiry was within his broad discretion to supervise the conduct of the trial and to prevent confusion of the issues. The trial court's brief inquiry helped to clarify for the jury the difference between the medical examination itself and the subsequent laboratory analysis of that examination. Such clarification, particularly in light of defendant's effort to confuse the jury with questions about this irrelevant testing procedure, was in all respects proper and did not prejudice Rizzi. *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073-74 (2d Cir. 1977).

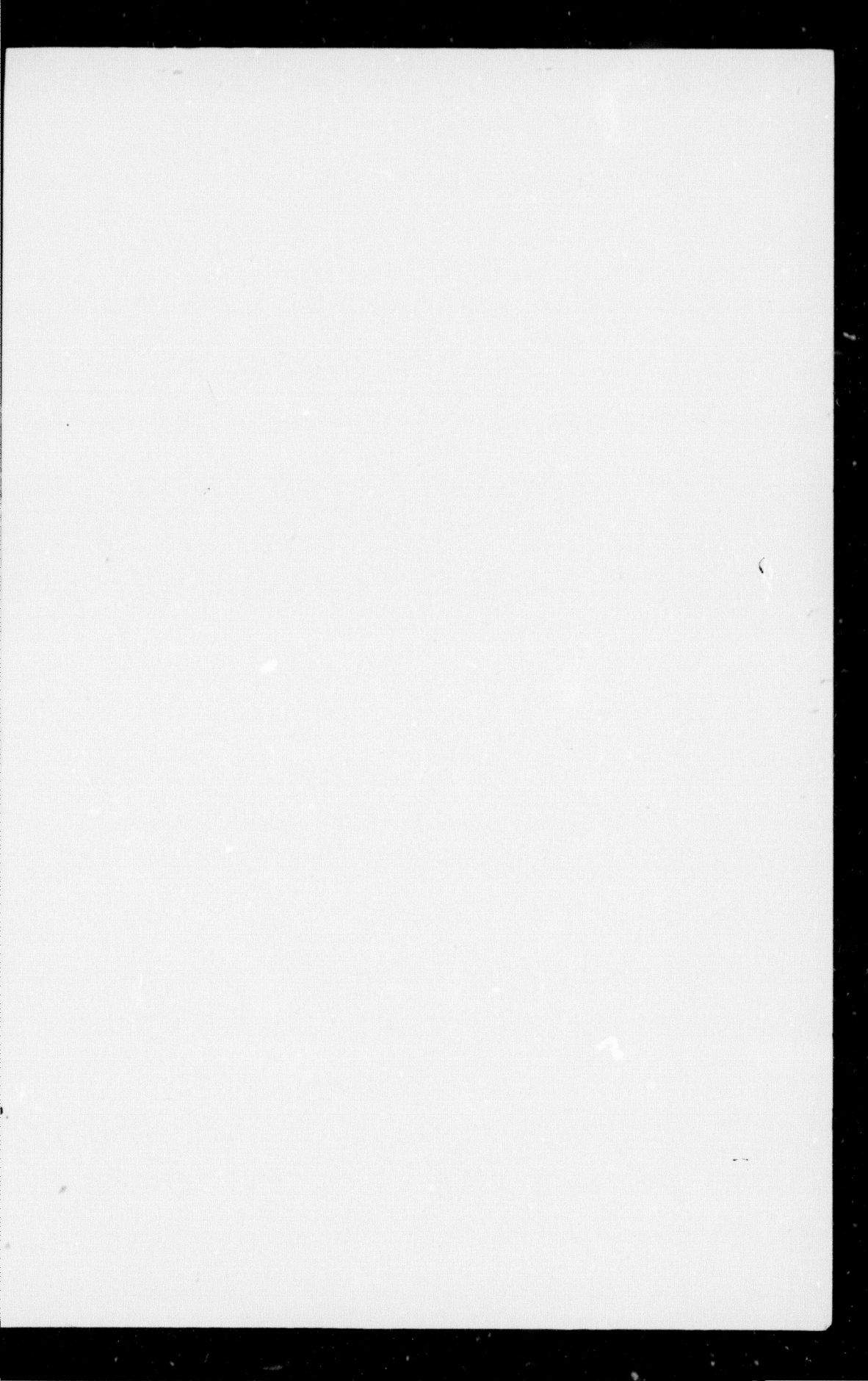
CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jo Ann Harris being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

*2
Copies*
That on the *30th* day of *MARCH*, 1978,
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in a properly postpaid franked envelope addressed:

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Jo Ann Harris

Sworn to before me this

30th day of March
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

